

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Ex Parte Communications

Docket No. RM2016-4

PUBLIC REPRESENTATIVE'S REPLY COMMENTS

(March 15, 2016)

The undersigned submits this filing pursuant to her designation as Public Representative in Order No. 3005 and the revised deadline for reply comments established by the Commission in Order No. 3076.¹

These comments address the concern that the proposed amendments fail to recognize the value of informal communications between the Commission, the Postal Service, and other stakeholders in the context of informal rulemakings.²

The Joint Commenters correctly observe that in *Sierra Club v. Costle*, the U.S. Court of Appeals for the District of Columbia Circuit opined:

Under our system of government, the very legitimacy of general policy making performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public . . . the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot

¹ See Order No. 3005, Notice of Proposed Rulemaking Regarding Ex Parte Communications, at 9 (January 8, 2016) and Order No. 3076, Order Granting Extension of Time to File Comments, at 2 (February 12, 2016).

² See Joint Comments of the Association of Mail Electronic Enhancement, the American Catalog Mailers Association, Inc., the Association of Postal Commerce, the Direct Marketing Association, Envelope Manufacturers Association, Epicomm, IDEAlliance, the Major Mailers Association, National Postal Policy Council, Newspaper Association of America, Parcel Shippers Association, Saturation Mailers Coalition, the American Forest & Paper Association, and the National Association of Presort Mailers, February 29, 2016 (Joint Comments). The associations and organizations filing the Joint Comments are collectively referred to as the Joint Commenters.

be underestimated. *Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated anticipate and share their plans for the future, and spur the provision of information which the agency needs.*

Joint Comments at 3, citing *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981).³ See also Comments of MPA—The Association of Magazine Media at 3 (February 29, 2013).⁴

Many agencies may, in fact, reap some or all of the benefits the Court of Appeals associated with allowing or encouraging ex parte communications: garnering program support, reducing future enforcement requirements, and obtaining needed information.⁵ However, the Commission's relatively unique mission means it generally does not conduct the type of large-scale programs — involving matters such as energy efficiency initiatives, space missions, anti-smoking campaigns, or highway safety standards — to which the D.C. Court of Appeals may have been referring. (The underlying issue in *Sierra Club v. Costle*, for example, concerned coal emission standards.) Similarly, the Commission's authority typically does not include exercising the type of industry enforcement action that may have informed the D.C. Court of Appeals' opinion, such as imposing substantial fines or other penalties (such as debarment from opportunities for lucrative contracts) for failing to meet federal standards.

As the Court of Appeals suggested, "[s]purring the provision of information which the agency may need" may be a reason for agencies, including the Commission, to allow ex parte communications. However, the Commission routinely provides an opportunity for reply comments in almost all dockets. The Commission also has an extremely generous policy with respect to granting extensions of time to file comments, accepting late-filed comments, and reconsidering stated positions upon request.

³ Internal citations omitted; emphasis supplied.

⁴ The undersigned's reading of Order No. 3005 led to the conclusion that the Commission was fully aware of the distinctions the D.C. Court of Appeals drew between on-the-record adjudications and more informal proceedings in *Sierra Club v. Costle*, but affirmatively elected to treat both in essentially the same way for purposes of administrative efficiency and consistency.

⁵ The Public Representative acknowledges that there may be other benefits the D.C. Court of Appeals did not mention.

Moreover, the Commission has a similarly generous policy of accepting replies to certain responses or other filings, even when such replies were not contemplated in the original schedule.⁶ Table 1 (presented in an attachment to this filing) provides selected examples covering several recent years.

In short, it is clear that the Commission, in the interest of obtaining the "information it needs," goes to considerable effort to accommodate on-the-record input from those who wish to weigh in on a matter within the Commission's jurisdiction, regardless of the official stage of a proceeding or the established deadlines for filings. There does not seem to be any reason to think that the Commission intends to alter its longstanding practice with respect to extending comment deadlines, accepting late-filed comments, or considering other documents filed in the ordinary course of a proceeding in the event it adopts final rules on ex parte communications. Thus, the third benefit cited in *Sierra v. Costle* — providing an agency with information it needs — has little, if any, direct bearing on the merits of allowing ex parte communications because the Commission typically allows interested persons to file any and all additional data and information, without strict adherence to the procedural schedule.

Notwithstanding the foregoing observations, the undersigned appreciates the interest the Joint Commenters, MPA, the Postal Service, and others have in an opportunity for candid exchanges with one or more Commissioners, especially when broad, prospective policy matters are under consideration. These exchanges may be especially productive as the Commission, pursuant to statute, begins to consider alternatives to the current ratemaking system. To address this legitimate interest, it may be useful for the Commission to elaborate on the process for waiver of the ex parte rules and policy, including whether such waiver contemplates disclosure or forgoes disclosure in its entirety. In addition, it may be useful for the Commission to address whether waiver occurs only on the Commission's initiative, or whether the Postal Service or others may petition for waiver.

⁶ This statement is based on a word search of the Commission's electronic docket filing system.

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

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Table 1

**Selected Recent Examples of Motions, Requests, and Orders Concerning
Extension of Comment Deadlines, Acceptance of Late-filed Comments, and Reconsiderations**

Date	Docket	Order Number (if applicable)	Caption of Filing
2/24/2016		Order No. 3097	Order Granting [United States Postal Service] Motion for Extension of Reply Comment Deadline
2/23/2016	R2013-10R	Order No. 3095	Order Extending Time to Respond to Motion for Reconsideration
2/22/2016	R2013-10R	---	[Postal Service] Motion for Reconsideration of Order No. 3047
1/5/2016	CP2016-9	Order No. 2980	Order Denying Motion for Reconsideration
12/14/2016	CP2016-9	---	Comments and Motion for Reconsideration of David B. Popkin
8/19/2015	CP2014-69	---	[United States Postal Service] Motion for Partial Reconsideration of Order No. 2167
5/27/2015	C2013-10	Order No. 2512	Order Granting Motion for Reconsideration and Granting Motion to Dismiss
4/23/2015	C2015-1	Order No. 2460	Order Denying Reconsideration of Commission Order No. 2377
4/8/2015	C2015-1	---	United States Postal Service Answer in Opposition to Complainants' Motion for Reconsideration
4/1/2015	C2015-1	---	Brief in Support of Motion for Reconsideration of Commission Order of Center for Art and Mindfulness, Inc. and Norton Hazel
3/14/2014	C2013-10	---	[United States Postal Service] Opposition to APWU's Motion for Reconsideration
3/7/2014	C2013-10	---	Motion for Reconsideration of the Dismissal of APWU's Complaints Regarding Violations of 39 C.F.R. § 121.1
11/12/2013	A2013-5	---	Motion for Leave to Submit Response to Postal Service Reply to Motion for Reconsideration
11/7/2013	A2013-5	---	Reply of the United States Postal Service to Dr. Hutkins's Motion for Reconsideration
10/31/2013	A2013-5	---	Motion [of Steve Hutkins] for Reconsideration of Order [No. 1866] Affirming Final Determination
10/30/2013	CP2013-77	Order No. 1865	Order Granting Motion for Reconsideration of Order No. 1822
10/16/2013	MC2013-60	---	Reply of the United States Postal Service to Motions Seeking Reconsideration of the Procedural

			Schedule
Date	Docket	Order Number (if applicable)	Caption of Filing
10/16/2013	MC2013-60	---	Motion of the United States Postal Service for Late Acceptance of the Filing of its Opposition to Motions Seeking Reconsideration of the Procedural Schedule
9/25/2013	MC2013-60	---	Petitioner's Support of and Expansion to Public Representative's Motion for Reconsideration of Order No. 1838
9/19/2013	MC2013-60	---	Public Representative Motion for Reconsideration and Clarification of Order No. 1838
9/19/2013	CP2013-77	---	Motion for Reconsideration of Order No. 1822
8/13/2013	C2009-1-R	Order No. 1807	Order on Reconsideration and Clarification
	C2009-1-R	---	Response of the Public Representative to USPS Motion for Reconsideration and Clarification of Order No. 1763
(August 1, 2013—refiled August 2, 2013)	C2009-1-R	---	Response of Gamefly, Inc., to USPS Motion for Reconsideration and Clarification of Order No. 1763
7/25/2013	C2009-1-R	---	United States Postal Service Motion for Reconsideration and Clarification of Order No. 1763
8/1/2012	MC2012-30	---	[United States Postal Service] Motion for Partial Reconsideration [of Order No. 1417]